

HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

KEVIN ZWICKER and TERESA K. PALMER,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a  
Delaware corporation,

Defendant.

MDL No. 1896

NO. C07-0291 JCC

**PLAINTIFFS' MOTION FOR  
FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT**

**Noted for Consideration:  
November 6, 2008, 9:00 a.m.**

ROY FALK, LEE KRATZER and BARBARA  
McRAE, on behalf of themselves and all others  
similarly situated, and on behalf of the general  
public,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a  
Delaware corporation,

Defendant.

NO. C08-0031 JCC

CHRIS CHRISTENSEN, TERRY M. KELLY,  
and PEGGY KELLY, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a  
Delaware corporation,

Defendant.

NO. C08-0032 JCC

## I. INTRODUCTION

This motion seeks final approval of a nationwide settlement which provides substantial benefits for over four million owners of specific makes and models of Defendant General Motors Corporation ("GM") vehicles. The settlement provides owners of certain 2003, 2004 and 2005 model year GM vehicles with a replacement speedometer free of charge, including labor, if the vehicles experience a speedometer problem within the earlier of seven years or 70,000 miles. Those who experience a speedometer malfunction within seven years and between 70,000 and 80,000 miles, whichever comes first, will receive a free replacement speedometer. Moreover, those owners who previously paid to repair their speedometers within the 70,000 mile limit will be entitled to reimbursement of their parts and labor repair costs, while those owners who previously paid for a speedometer repair within the 80,000 mile limit will be entitled to reimbursement for the cost of the replacement parts.

This Court granted preliminary approval and provisional certification to the Class on March 4, 2008. GM subsequently has obtained the name and address information for Class Members and mailed the Court-approved notice to the Class. The period for filing objections and opting out expires on October 17, 2008. Accordingly, Plaintiffs now move the Court to grant final approval to the Settlement. Plaintiffs submit the Settlement is fair, reasonable and adequate, provides a substantial benefit to the Class, and meets all criteria for final approval under Ninth Circuit law.

## II. STATEMENT OF FACTS

### A. Factual Background

In lawsuits filed in Washington, Oregon and California, Plaintiffs allege the following GM vehicles contain a flawed part — the stepper motor — that may cause premature speedometer failure: 2003, 2004, and 2005 (manufactured on or before December 31, 2004) model years Chevrolet Silverados, Avalanches, Suburbans and Tahoes; Cadillac Escalades; and GMC Sierras, Yukons and Yukon XLs (hereinafter collectively, "the GMT800 Series" or "the Trucks"). Plaintiffs contend that GM is liable for post-warranty failures of the defective

1 speedometers. Plaintiffs further allege that GM failed to disclose the Trucks contain  
 2 speedometers that may fail prematurely and that this failure poses a safety hazard because  
 3 vehicle owners with broken speedometers may be unknowingly driving faster than the speed  
 4 registered on the speedometer. Plaintiffs in all three cases have experienced speedometer  
 5 failures. Declaration of Kim D. Stephens in Support of Plaintiffs' Motion for Final Approval  
 6 of Class Action Settlement ("Stephens Decl.") ¶ 2.

#### 7 **B. Procedural History**

8 The procedural posture of each of the three existing cases is summarized below. The  
 9 Court has conditionally approved a nationwide Class to include the named Plaintiffs in all three  
 10 cases:

11 1. *Kevin Zwicker and Teresa K. Palmer et al. v. General Motors Corporation*,  
 12 Case No. C07-0291-JCC (W.D. Wash.). Plaintiffs filed this case on February 23, 2007,  
 13 alleging breach of express and implied warranty, misrepresentation, unjust enrichment, and  
 14 violation of Washington's Consumer Protection Act (RCW 19.86.010). GM moved to dismiss  
 15 the Complaint, claiming it had no liability for post-warranty failures. On July 26, 2007, the  
 16 Court denied the motion, with the exception of dismissing Plaintiffs' unjust enrichment claim.  
 17 Stephens Decl. ¶ 3.

18 2. *Roy Falk, Lee Kratzer and Barbara McRae et al. v. General Motors*  
 19 *Corporation*, Case No. C07-01731-WHA (N.D. Cal.). Plaintiffs filed this case on March 27,  
 20 2007, alleging violations of the Consumers Legal Remedies Act (CLRA), Business and  
 21 Professions Code section 17200, fraud by omission, and unjust enrichment. GM moved to  
 22 dismiss the Complaint. On July 3, 2007, the Court denied the motion with the exception of  
 23 dismissing Plaintiffs' unjust enrichment claim. The Court rejected GM's request to bifurcate  
 24 discovery between "class" and "merits" and set early deadlines. Stephens Decl. ¶ 4.

25 3. *Robert W. Christensen, Terry M. Kelly and Peggy Kelly et al. v. General Motors*  
 26 *Corporation*, Case No. CV07-0512-HA (D. Or.). Plaintiffs filed this case on April 9, 2007.  
 27

1 The Court stayed this case pending ruling by the Judicial Panel on Multi-District Litigation  
 2 (“JPML”) on GM’s motion to consolidate the three actions and transfer them to Washington.  
 3 Stephens Decl. ¶ 5.

4 On January 8, 2008, the JPML issued an order consolidating the three pending cases  
 5 and transferring them to this Court. Since that time, one more case has been added: *Rebecca*  
 6 *Connelly et al. v. General Motors Corporation*, Case No. 1:08-00483 (D. S.C.). Stephens Decl.  
 7 ¶ 6.

### 8 **C. Plaintiffs Thoroughly Investigated the Case**

9 Plaintiffs have thoroughly investigated this case, using both formal and informal  
 10 discovery methods. Before filing, Plaintiffs did extensive research through use of public  
 11 records and the Internet to identify the scope of the speedometer failures, the affected vehicles,  
 12 and the costs of replacement. Plaintiffs retained experts, interviewed mechanics in  
 13 speedometer shops, and otherwise vigorously investigated and discovered their claims. *Id.* ¶ 7.

14 Discovery has shown that starting in 2003, consumers filed an unusually high number  
 15 of complaints regarding speedometer failures in GM’s full-size GMT800 Series trucks and  
 16 SUVs. These vehicles include the Chevrolet Silverado, Avalanche, Suburban and Tahoe; the  
 17 Cadillac Escalade; and the GMC Sierra, Yukon and Yukon XL (“GMT800 Series”).<sup>1</sup> They  
 18 contain an allegedly defective stepper motor, which can cause speedometer malfunctions. *Id.*  
 19 ¶ 8.

20 Plaintiffs reviewed over 75,000 pages of imaged documents, plus 13 CD-ROMs  
 21 containing advertising produced by GM. Plaintiffs deposed three corporate designees  
 22 regarding key aspects of GM’s research and development and claims processes: Mark  
 23 Schneider, Team Leader, WINS Warranty Claim Payment, GM, deposed on November 13,  
 24 2007; Robert Bordo, Engineering Group Manager, GM, and Brian Stouffer, Product  
 25

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26 <sup>1</sup> This proposed Settlement Class does not include owners of vehicles other than those listed here. Owners of  
 27 vehicles not included in the Settlement will not have their claims extinguished or compromised by this Settlement.

1 Investigator, GM, both deposed on November 14, 2007. *Id.* ¶ 10. The parties also held several  
2 separate hours-long meet-and-confer sessions regarding GM's discovery responses during  
3 August 2007. *Id.* ¶ 11. GM continued to produce documents on a "rolling" basis prior to  
4 Settlement. Plaintiffs also commenced third-party discovery on two of GM's component  
5 suppliers, Delphi and Innovative Sales & Marketing, Inc. *Id.* ¶ 12.

6 Beginning in March 2007, shortly after the filing of the *Zwicker* action, GM and the  
7 National Highway Traffic Safety Administration ("NHTSA") had a series of discussions  
8 concerning the rate of speedometer malfunctions in GMT800 Series vehicles, after which GM  
9 agreed to initiate a Special Coverage Campaign for 2003 and 2004 GMT800 Series vehicles.  
10 *Id.* ¶ 13. GM agreed that these lawsuits were a factor in its initiation of the Special Coverage  
11 Campaign. *Id.* ¶ 14. Shortly before the Special Coverage Campaign notification was sent, GM  
12 informed Plaintiffs' counsel that the campaign would be undertaken, and the parties agreed to  
13 mediate this dispute. *Id.* ¶ 15.

14 Mediation took place on September 27 and October 12, 2007, facilitated by the  
15 Honorable Edward A. Infante, a former U.S. Magistrate Judge for the Northern District of  
16 California and an experienced mediator. *Id.* ¶ 16. On September 28, 2007, approximately six  
17 months after Plaintiffs filed the above three actions, GM mailed notice to affected customers of  
18 that "Special Coverage Campaign" extending the warranties on the instrument panel cluster,  
19 which includes the speedometer. *Id.* ¶ 17. The Special Coverage Campaign extended the  
20 warranties from the existing three years and 36,000 miles to seven years and 70,000 miles. *Id.*  
21 ¶ 18.

22 The parties reached an agreement in principle on Class benefit at the second mediation  
23 session. The benefits were enlarged beyond the Special Coverage Campaign with the addition  
24 of 2005 model year GMT800 Series vehicles built before December 31, 2004. The vehicles  
25 had a greater chance of containing a rotor which could cause the speedometer to malfunction  
26 than those built after that date. *Id.* ¶ 19. The benefits were further enlarged by adding a "parts  
27

only" warranty on the instrument cluster for failures taking place between 70,000 and 80,000 miles. Most of the cost of a speedometer replacement is the instrument cluster cost, not the labor. *Id.* ¶ 20.

After agreeing on these enlarged benefits, the parties then engaged in further negotiations, with considerable assistance from Judge Infante, over attorneys' fees to Class Counsel. *Id.* ¶ 21. The parties essentially concluded negotiations in late November 2007, but spent the next three months documenting a formal Settlement Agreement, which was signed on February 26, 2008. *Id.* ¶ 22.

### III. THE PROPOSED SETTLEMENT

The Settlement's details are contained in the Settlement Agreement signed by the parties. *Id.*, Ex. 1. These are the Settlement Agreement's key terms:

#### A. The Settlement Class

The proposed Settlement Class ("the Class") consists of all owners of 2003 and 2004 model years GMT800 Series vehicles, plus 2005 model year GMT800 Series vehicles built on or before December 31, 2004. The Settlement Class consists of current owners of approximately 3.8 million vehicles. The Class is defined as:

All current United States owners and lessees of Model Years 2003–2005 General Motors GMT800 Platform automobiles manufactured on or before December 31, 2004. The makes and models included in the GMT800 Platform, and owned by the Settlement Class are Chevrolet - Avalanche, Silverado, Suburban, and Tahoe; GMC - Sierra, Yukon and Yukon XL; Cadillac - Escalade, Escalade ESV, and Escalade EXT. Excluded is any person, firm, corporation, trust or other entity related to or affiliated with Defendant General Motors and Defendant's legal representatives, assigns and successors. Also excluded is any person who has or had an action for personal injury or death against General Motors as a result of an allegedly defective instrument cluster, speedometer, or stepper motor in any of the subject Vehicles, the judge to whom this case is assigned and any member of the judge's immediate family.

*Id.*, Exh. 1, ¶ 12.



**B. The Special Coverage Campaign**

GM concedes that Plaintiffs' lawsuits were a factor that led GM to initiate a Special Coverage Campaign, which provides Class Members a remedy for the defective part. *Id.* ¶ 14. Under GM's Special Coverage Campaign, the Class Members owning 2003 and 2004 Trucks will receive an enhanced warranty pertaining to the speedometers on the subject vehicles. *Id.* ¶¶ 13, 18; *see also id.*, Exh. 1 at Exh. A.. Also, Class Members who obtained speedometer repairs prior to the Special Coverage Campaign are entitled to reimbursement up to the amount GM would have paid a GM dealership to make the repairs. *Id.* ¶ 25.

As a result of the Special Coverage Campaign, approximately over three million Class Members who own Trucks manufactured in 2003 and 2004 are entitled to free replacement (including labor) of their broken speedometers for seven years or 70,000 miles, whichever comes first. *Id.* ¶ 26. This benefit practically doubles GM's standard 3-year/36,000-mile warranty normally applicable to the speedometers, at no cost to Class Members.

**C. Additional Benefits Obtained Under the Class Settlement**

Although the Special Coverage Campaign covers the 2003 and 2004 model years, the Settlement expands these benefits to model year 2005 GMT800 Series vehicles built on or before December 31, 2004. The addition of the model year 2005 Trucks to the Special Coverage Campaign and to this Settlement, provides replacement or reimbursement to approximately 746,000 additional GM Truck owners. *Id.* ¶ 27. Plaintiffs' litigation and proposed Settlement therefore creates substantial benefits for the Class as a whole, particularly for those Class Members who will save, on average, roughly \$500 in repair costs if their speedometers need replacement. *Id.* ¶ 28.

**D. Claims Administration**

As set forth in the Settlement Agreement, GM will act as the Claims Administrator. Class Members may appeal an adverse determination by GM regarding their claim through the dispute resolution processes available at the Better Business Bureau. GM will pay for the cost of the dispute resolution process. *Id.* ¶ 29.

1 **E. Attorneys' Fees and Class Representatives' Stipend**

2 GM has agreed to pay Plaintiffs' attorneys' fees and costs in the amount of \$2.3 million.  
 3 These fees will be paid in addition to monies set aside for the Class and will not affect  
 4 reimbursements made to Class Members. The requested stipends for Class representatives will  
 5 also be paid out of this amount. *Id.* ¶¶ 30, 31.

6 The Settlement Agreement provides for a \$1,500 stipend for each person who served as  
 7 a Class representative in the three cases. These stipends recognize their service to and efforts  
 8 on behalf of the Class. These stipends are in addition to the relief the Class representatives will  
 9 be entitled to under the terms of the Settlement and would be paid from any amount awarded as  
 10 attorneys' fees. *Id.* ¶ 31.

11 Throughout the litigation, the Class representatives accepted burdens that were not  
 12 imposed on the rest of the Class. Unlike unnamed Class Members, who will enjoy the benefits  
 13 of the representatives' efforts without taking any personal action, the named Class  
 14 representatives exposed themselves to GM's investigation, made themselves available as  
 15 potential witnesses at deposition and trial, and subjected themselves to all the obligations of  
 16 named parties. A stipend for these named Class representatives is therefore appropriate.  
 17 Incentive awards, which serve as premiums in addition to any claims-based recovery from the  
 18 settlement, promote the public policy of encouraging individuals to undertake the responsibility  
 19 of representative lawsuits. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga.  
 20 2001) (courts routinely approve incentive awards to compensate named plaintiffs for services  
 21 they provide); *see also Manual for Complex Litigation* (Fourth) § 21.62 n.971 (2004) (incentive  
 22 awards may be "merited for time spent meeting with class members, monitoring cases, or  
 23 responding to discovery"). Such awards are common and range from several hundred dollars  
 24 to many thousands of dollars, although most often they fall within the \$1,000 to \$3,000 range,  
 25 as requested here. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003) (approving  
 26 incentive award of \$5,000 for each class representative); *Coca-Cola*, 200 F.R.D. at 694  
 27 (approving enhancement payments of \$3,000 for each person who executed an affidavit, in



1 recognition of contribution to litigation that entailed risk and effort); *see also* Sherrie R. Savett,  
 2 *Consumer Class Actions: Class Certification Issues, Including Ethical Considerations and*  
 3 *Counsel Fees and Incentive Payments to Named Plaintiffs*, Prac. Law. Inst. pp. 340–345 (1996)  
 4 (compiling list of 52 cases with incentive awards to class representatives).

#### 5 **F. Notice and Response From the Class**

6 On March 4, 2008, this Court preliminarily approved the Settlement and provisionally  
 7 certified a Settlement Class. GM paid for the administration and distribution of notice to the  
 8 Class. Working with a vendor, Campbell-Ewald, GM obtained name and address data for  
 9 current registered owners and lessees of the Trucks through R.L. Polk & Co, a company that  
 10 collects registration information from departments of motor vehicles in each of the 50 states.  
 11 GM then paid to have the data run through the National Change of Address database to update  
 12 addresses and ensure the highest number possible of Class Members receive mailed notice.  
 13 Notice was then sent to each owner identified through this process via first class mail. In  
 14 addition, GM researched the names and addresses of any Class Members for whom notice was  
 15 returned as undeliverable after the initial mailing. *See generally* Declaration of Kathryn  
 16 Appleby (“Appleby Decl.”).

#### 17 **IV. THE SETTLEMENT APPROVAL PROCESS**

18 As a matter of “express public policy,” federal courts strongly favor and encourage  
 19 settlements, particularly in class actions and other complex matters, where the inherent costs,  
 20 delays, and risks of continued litigation might otherwise overwhelm any potential benefit the  
 21 class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.  
 22 1992) (noting that “strong judicial policy . . . favors settlements, particularly where complex  
 23 class action litigation is concerned.”); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg*  
 24 *on Class Actions* § 11.41 (4th ed. 2002) (gathering cases). As discussed below, the proposed  
 25 settlement constitutes the best vehicle for Class Members to receive the relief to which they are  
 26 entitled in a prompt, efficient manner.

1 The class action settlement approval is a three-step process. *See Manual for Complex*  
 2 *Litig.* (Fourth) §§ 21.632–34 n.971 (2004). Here, two of the three steps have already been  
 3 completed. First, preliminary approval of the Settlement and provisional certification of the  
 4 Class took place on March 4, 2008. The second step involved the implementation of the notice  
 5 program approved by the Court. The third and final step is now before the Court — final  
 6 approval of the Settlement.

7 **A. The Notice Program Provided Constitutionally Sound Notice to the Class**

8 1. Notice Standards

9 To protect the rights of absent Class Members, the best notice practicable of a potential  
 10 settlement must be provided. *See* Fed. R. Civ. P. 23(e)(1); *Phillips Petroleum Co. v. Shutts*,  
 11 742 U.S. 797, 811–12 (1985); *Eisen & Carlisle v. Jacquelin*, 417 U.S. 156, 174–75 (1974);  
 12 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As the *Manual for*  
 13 *Complex Litig.* observes, “Rule 23 . . . requires that individual notice in [opt-out] actions be  
 14 given to class members who can be identified through reasonable efforts. Those who cannot be  
 15 readily identified must be given the ‘best notice practicable under the circumstances.’” *Id.* at  
 16 § 21.311. “[D]ue process has not required actual notice to parties who cannot reasonably be  
 17 identified.” *Id.* at n.882.

18 2. The Notice Program Has Been Fully Implemented and Meets Applicable  
 19 Standards

20 Rule 23(e)(1) requires “direct notice” be provided “in a reasonable manner to all class  
 21 members who would be bound by the propos[ed settlement].” Here, GM obtained names and  
 22 addresses from the appropriate state agencies for all registered GMT800 Series vehicles for the  
 23 affected model years. Appleby Decl. ¶ 3. After updating those names and addresses with the  
 24 Post Office’s change of address database, Campbell-Ewald, GM’s vendor, arranged for the  
 25 mailing of class notice to 3,884,725 Class Members. *Id.* ¶¶ 3–4. Of these notices, 85,608 were  
 26 returned as undeliverable. *Id.* ¶ 5. For each of those returned as undeliverable, GM researched  
 27 the names and addresses and was able to re-mail notice packages to 9,223 of those Class

Members. *Id.* This data means that notice reached 98.1 % of the Class, even accounting for those notices returned as undeliverable.

**B. Final Approval of the Settlement is Appropriate**

When considering a motion for final approval, a court inquires into whether the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *City of Seattle*, 955 F.2d at 1276. A court may find a settlement to be fair, reasonable, and adequate when “the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued.” *Manual for Complex Litig.* at § 30.42. The decision to approve or reject a proposed settlement is committed to the sound discretion of the trial court. *See City of Seattle*, 955 F.2d at 1276; *Moore v. Nat’l Ass’n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985).

In affirming the settlement approved by the trial court in *City of Seattle*, the Ninth Circuit noted it “need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” 955 F.2d at 1291 (internal quotation and citation omitted). The district court’s ultimate determination “will involve a balancing of several factors,” which include:

1. The strength of plaintiffs’ case;
2. The risk, expense, complexity, and likely duration of further litigation;
3. The risk of maintaining class action status throughout the trial;
4. The amount offered in settlement;
5. The extent of discovery completed, and the stage of the proceedings;
6. The experience and views of counsel; and
7. The reaction of the class members to the proposed settlement.

*Id.* (quoting *Officers for Justice. v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)).

1           1.       The Settlement is Presumed to be Fair, Adequate, and Reasonable

2           When parties to a litigation reach settlement through arm's-length negotiations by  
3 capable counsel with experience in complex class action litigation, then the settlement is  
4 presumed to be fair. *See M. Berenson Co. v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 822  
5 (D. Mass. 1987). This presumption applies here: Class Counsel have extensive experience in  
6 class action litigation, and they reached the settlement with GM through negotiation with an  
7 experienced mediator. Stephens Decl. ¶¶ 13–19, 41; *see also* Declaration of Michael F. Ram in  
8 Support of Motion for Final Approval of Class Action Settlement Agreement (“Ram Decl.”)  
9 ¶¶ 2–4; Declaration of Karl Olson In Support of Motion for Final Approval of Class Action  
10 Settlement Agreement (“Olson Decl.”) ¶¶ 2–4; Declaration of Gary E. Mason in Support of  
11 Motion for Final Approval of Class Action Settlement Agreement (“Mason Decl.”) ¶¶ 2–4; and  
12 Declaration of Kevin L. Oufnac In Support of Motion for Final Approval of Class Action  
13 Settlement Agreement (“Oufnac Decl.”) ¶¶ 2–3.

14           Settlement negotiations began in September 2007 and continued while litigation  
15 proceeded. On October 12, 2007, the parties reached an agreement in principle on Class  
16 benefits. Attorneys’ fees and costs and Class representative stipends were then negotiated and  
17 agreement reached in November 2007. The Settlement Agreement itself was signed on  
18 February 26, 2008.

19           2.       All of the Relevant Factors Support Final Approval

20           a.       *Plaintiff Obtained Significant Relief for the Class*

21           The Settlement provides significant relief for Class Members whose Trucks have the  
22 allegedly defective stepper motor that may cause a premature speedometer failure. All eligible  
23 Settlement Class Members who experience a problem with their speedometers with less than  
24 70,000 miles, or seven years in service, will receive a free replacement simply by bringing their  
25 vehicles in for repairs. Those Class Members who have paid out-of-pocket for speedometer  
26 repairs will be reimbursed up to the amount a customer would pay for repairs at a GM dealer.  
27 Those Class Members whose Trucks speedometers fail between 70,000 and 80,000 miles will

1 get a free replacement part as long as their vehicles are less than seven years old, which the vast  
2 majority are.

3 The Settlement provides a forward-looking enhanced warranty that covers all parts and  
4 labor required for a GM-authorized technician to repair the allegedly defective part until the  
5 Class Member's Truck has 70,000 miles or is seven years old. The enhanced warranty differs  
6 from GM's standard warranty, which only covers speedometer repairs for 36,000 miles or three  
7 years, whichever comes first. The Settlement also provides relief above and beyond that  
8 offered by GM's Special Coverage Campaign (which was initiated after, and at least partially  
9 in response to, this litigation) by adding owners of at least another 746,000 additional vehicles:  
10 those who own 2005 model year GMT800 Series vehicles (manufactured on or before  
11 December 31, 2004). GM will also provide replacement parts for vehicles in the covered  
12 model years which experience a speedometer problem while their vehicles have traveled more  
13 than 70,000 but less than 80,000 miles. In sum, for the vast majority of owners who experience  
14 a speedometer malfunction or failure, this Settlement will provide them with repairs at no cost  
15 (before seven years/70,000 miles) or very low cost (seven years/70,000 – 80,000 miles).

16 *b. The Risks Inherent In Continued Litigation Support Final*  
17 *Approval*

18 Courts weigh the benefits of the settlement against the expense and delay involved in  
19 achieving an equivalent or more favorable result at trial. *See Young v. Katz*, 447 F.2d 431, 434  
20 (5th Cir. 1971). This Settlement serves the interest of the Class in prompt, efficient and  
21 effective relief, bypassing the complexity, expense and lengthy duration of continued litigation.  
22 *See City of Seattle*, 955 F.2d at 1291.

23 Here, Plaintiffs believe they have a strong case on the merits. Their pre-filing and  
24 continuing post-filing investigation indicated that the occurrence of defective speedometers are  
25 not isolated incidents. Discovery confirmed that the problems were widespread, and in some  
26 respects revealed that the prevalence of failures was greater than suspected at the outset.

1 Indeed, GM has agreed Plaintiffs' lawsuits were a factor in the decision to extend its warranty  
2 coverage for the instrument cluster through the Special Coverage Campaign.

3 Nevertheless, Class Counsel also recognize the potential pitfalls lying on the path to a  
4 favorable judgment. Perhaps the most significant relates to Plaintiffs' claim that GM knew the  
5 instrument clusters were defective, yet failed to disclose this problem to consumers. As a result  
6 of GM's alleged non-disclosure, many of the problems with the instrument cluster manifested  
7 after the expiration of GM's new-vehicle limited warranty of three years or 36,000 miles.

8 If the Court or a jury were to find that GM did not fraudulently or negligently fail to  
9 disclose this defect, then the majority of the Class claims could be in jeopardy. Over the past  
10 couple of years, courts have held that product defects manifesting after the applicable warranty  
11 period do not give rise to express-warranty or other claims. In *Clemens v. DaimlerChrysler*  
12 *Corp.*, 534 F.3d 1017 (9th Cir. 2008), the head gasket in plaintiff's Dodge Neon automobile  
13 failed after the express warranty expired. He then brought a putative class action, alleging the  
14 head gaskets in Dodge Neons were prone to failure. In affirming the district court's dismissal<sup>2</sup>  
15 of the consumer fraud claim, the Ninth Circuit stated that "where '[t]he only expectation buyers  
16 could have had about [a particular] engine was that it would function properly for the length of  
17 [the manufacturer's] express warranty,' the public was not likely to be deceived." *Id.* at 1026  
18 (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118  
19 (2006)) (changes in original).

20 Even if Plaintiffs navigated around this dangerous precedent, relief for the Class would  
21 not be guaranteed. In *Avery v. State Farm Mutual Auto. Ins. Co.*, 216 Ill. 2d 100, 835 N.E.2d  
22 801 (2005), *cert. denied*, 126 S. Ct. 1470 (2006), plaintiffs saw a \$1 billion damages award  
23 survive appellate review, only to be overturned in its entirety by a state supreme court. The  
24 *Avery* plaintiffs filed their action in Illinois state court in 1997, alleging that in arranging for the  
25

26 <sup>2</sup> Although, both the *Zwicker* and *Falk* plaintiffs managed to defeat GM's motions to dismiss. See *Falk v. GM*,  
27 496 F. Supp. 2d 1008 (N.D. Cal. 2007); *Zwicker v. GM*, Slip Copy, 2007 WL 5309205 (W.D. Wash. July 26,  
2007).



1 repair of policyholders' vehicles, State Farm specified the use of cheaper, inferior parts  
2 whenever possible. Plaintiffs obtained certification of a 48-state class, and the trial was held in  
3 1999. Hundreds of exhibits were introduced, and dozens of witnesses testified. Plaintiffs'  
4 breach of contract claim was tried to the jury, and their other claims were tried to the court.  
5 The jury found for plaintiffs on their breach of contract claim, and the court found for plaintiffs  
6 on their statutory consumer fraud claim. The court awarded plaintiffs \$1,186,180,000 in  
7 damages. State Farm appealed. In 2001, the appellate court reduced the award to  
8 \$1,056,180,000, but otherwise affirmed the judgment. State Farm sought review by the Illinois  
9 supreme court. In 2005, the supreme court reversed the judgment of the appellate court on both  
10 class certification and the merits. In 2006, the United States Supreme Court denied plaintiffs'  
11 petition for certiorari.

12 Even if this Class were to ultimately prevail at trial, GM would inevitably appeal and  
13 petition for review and the Class would have to wait a protracted period for relief. In the  
14 meantime, the vehicles at issue would continue to be driven, potentially without the owner's  
15 knowledge of his or her true speed as a result of the speedometer defect, and the vehicles would  
16 continue to add on miles, exceeding the expanded coverage of the Settlement, and hence,  
17 become unable to qualify for repair and replacement of defective speedometers. In contrast, the  
18 proposed Settlement is designed to fix defective speedometers now, not in five years after trial  
19 and appeal are over and the Class has shrunk to nothing.

20 It bears emphasis that Class Members will have their defective speedometers repaired  
21 free of charge and, in some cases, they will be reimbursed for replacements that have already  
22 taken place. By comparison, in other cases alleging significant automotive problems or defects,  
23 courts have approved settlements providing only discount certificates applicable to the  
24 purchase or lease of a new vehicle. Just earlier this year, such a settlement was approved by the  
25 Superior Court of Sacramento County, California. In 2007, trial started in the *Ford Explorer*  
26 *Cases*, Judicial Council Coordination Proceeding Nos. 4226 and 4270, which alleged that Ford  
27

1 Explorer sport-utility vehicles had a high rollover propensity. After 50 days of trial, plaintiffs  
 2 and Ford agreed to a class action settlement covering residents of California, Texas, Illinois,  
 3 and Connecticut. The settlement, which was granted final approval in April 2008, provided  
 4 claimants with certificates good for \$500 off the purchase or lease of a new Ford Explorer, or  
 5 \$300 off the purchase or lease of any other Ford, Lincoln, or Mercury vehicle. *See* Ford  
 6 Explorer settlement website, *available at* <https://www.explorerclaims.com> (visited Sept. 28,  
 7 2008).

8 In speaking to the press on the day of preliminary settlement approval, plaintiffs' lead  
 9 attorney in the *Ford Explorer Cases* said they settled for certificates because of Ford's  
 10 precarious financial condition. *See* Don Thompson, *Sacramento Judge Approves Ford*  
 11 *Explorer Four-State Settlement*, Associated Press (Dec. 3, 2007), *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/12/03/state/n161401S22.DTL&feed=rss.business>  
 12 (visited Sept. 28, 2008). Counsel's comment points to yet another risk this Class would have to  
 13 bear in continued litigation. As with Ford, GM's financial condition is also troubled, as has  
 14 been widely reported in the media. At the time of negotiating the Settlement, GM faced  
 15 declining U.S. sales of 21.3 percent, and the possibility of closing plants because of striking  
 16 auto parts makers. At present, GM, according to one news report: "faces a crisis like no other  
 17 in its history." In the last 18 months, it lost \$57.5 billion and has more than \$32 billion in long  
 18 term debt. The poor economy has forced it to close factories and lay off workers. In July, GM  
 19 suspended its dividend. *See* Stephens Decl., Exhs. 2, 3, 4.

21 The Ninth Circuit has stated: "A settlement proposal need not provide the best or  
 22 speediest relief imaginable to be fair, adequate and reasonable." *Officers for Justice v. Civil*  
 23 *Svc. Comm'n of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982); *see also Hanlon v. Chrysler*  
 24 *Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the  
 25 question we address is not whether the final product could be prettier, smarter or snazzier, but  
 26 whether it is fair, adequate and free from collusion.") Plaintiffs believe the present Settlement  
 27

1 meets this standard with ease. Accordingly, for the reasons stated above, Plaintiffs submit the  
 2 present Settlement meets this standard with ease.

3 *c. Discovery Supports Final Approval*

4 As discussed above, Plaintiffs thoroughly investigated this case through both formal and  
 5 informal discovery methods. Plaintiffs' investigation began long before filing their complaints,  
 6 by reviewing public records, commissioning expert laboratories, and searching the Internet to  
 7 identify the scope of the speedometer failures, the affected vehicles, and the costs of  
 8 replacement, as well as conducting extensive interviews with affected consumers.

9 Formal discovery included written interrogatories and requests for documents,  
 10 subpoenas to third parties, review of over 75,000 pages of imaged documents, and 13 CD-  
 11 ROMs of advertising produced by GM. Plaintiffs deposed three corporate designees regarding  
 12 key aspects of GM's research and development and claims processes. Plaintiffs commissioned  
 13 expert laboratory testing of the defective part and interviewed speedometer shop mechanics.

14 Discovery has also shown that, as to the high mileage Trucks that are not covered by the  
 15 settlement (i.e., those with speedometers that have lasted more than 80,000 miles), the issue of  
 16 wear and tear of over 80,000 miles, and in some cases more than 100,000 miles, becomes a  
 17 competing factor that constitutes an alternative cause of speedometer failure. Stephens Decl.  
 18 ¶ 9. Given the causation issues faced by the owners of the high mileage vehicles that are not  
 19 covered (as gleaned from discovery in this case), Plaintiffs submit that the Settlement here is  
 20 fair and reasonable. *Id.* ¶ 42; Ram Decl. ¶ 5; Olson Decl. ¶ 5; Mason Decl. ¶ 5; Oufnac Decl.  
 21 ¶ 4.

22 *d. Class Counsel Favor Final Approval*

23 "When experienced and skilled class counsel support a settlement, their views are given  
 24 great weight." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983). Class Counsel  
 25 here have extensive experience prosecuting class actions through both settlement and trial.  
 26 They support this Settlement as fair, reasonable and adequate, and in the best interests of the  
 27

1 Class as a whole. Stephens Decl. ¶¶ 43–44; Ram Decl. ¶¶ 2–5; Olson Decl. ¶¶ 2–5; Mason  
 2 Decl. ¶¶ 2–5; Oufnac Decl. ¶ 2–4.

3 *e. Class Members' Positive Reaction Supports Final Approval*

4 Significantly, the Settlement has already received a positive response from the Class.  
 5 Whether class members react favorably to a proposed settlement is an important factor for the  
 6 court to consider when determining if the proposal is fair, reasonable, and adequate. *City of*  
 7 *Seattle*, 955 F.2d at 1291; *Bryan v. Pittsburg Plate Glass Co.*, 494 F.2d 799, 802 (3d Cir.  
 8 1974). When few class members object, a court may appropriately infer that a class action  
 9 settlement is fair, adequate, and reasonable. *Chiaramonte v. Pitney Bowes, Inc.*, Slip Copy,  
 10 2008 WL 510765, \*6 (S.D. Cal. Feb. 25, 2008); *see also Hanlon*, 150 F.3d at 1027 (“[T]he fact  
 11 that the overwhelming majority of the class willingly approved the offer and stayed in the class  
 12 presents at least some objective positive commentary as to its fairness.”). Indeed, a court may  
 13 approve a class action settlement as fair, adequate, and reasonable even over the objections of a  
 14 significant percentage of class members. *See City of Seattle*, 955 F.2d at 1291–96; *Bryan*,  
 15 494 F.2d at 803 (“While the proportion of the class opposed to a settlement is often one factor  
 16 to be considered in assessing its fairness, . . . a settlement is not unfair or unreasonable simply  
 17 because a large number of class members oppose it.”).

18 Here, only fifteen objections have been received. The percentage of Class Members  
 19 who have submitted negative comments is extremely low, less than .01 percent of the Class.  
 20 Furthermore, none of the views expressed furnishes any basis to withhold settlement approval.  
 21 For instance, some objectors believe this action should never have been brought because the  
 22 warranty covered only three years or 36,000 miles. In contrast, other objectors contend the  
 23 Settlement should cover all vehicles regardless of mileage traveled. Stephens Decl. ¶¶ 37–38.  
 24 As explained above, this Settlement will capture the majority of Trucks with defective parts  
 25 and reimburse a great number of Class Members for their out-of-pocket expenses in fixing the  
 26  
 27

1 problem, while eliminating the substantial risks associated with continued litigation and trial.  
 2 *Id.* ¶ 39.

3 In their reply papers, to be filed after the expiration of the comment deadline, Plaintiffs  
 4 will address all objections received in greater detail. If the reaction of the Class to date is any  
 5 indication, however, Plaintiffs expect the fraction of objectors will remain low, reflecting  
 6 overwhelming support for the Settlement. *Id.* ¶ 40.

7 *f. The Presence of Good Faith and the Absence of Collusion Favors*  
 8 *Final Approval*

9 Courts often also consider the presence of good faith and the absence of collusion  
 10 between the settling parties when analyzing whether to grant final approval to a settlement.  
 11 4 *Newberg on Class Actions* § 11.43. No collusion or bad faith exists here, nor have any  
 12 allegations been raised regarding such behavior. Courts recognize that when an agreement has  
 13 been reached through arm's-length negotiations by competent counsel, a *prima facie* case of  
 14 fairness attaches. As the Supreme Court has held, "[o]ne may take a settlement amount as good  
 15 evidence of the maximum available if one can assume that parties of equal knowledge and  
 16 negotiating skill agreed upon the figure through arm's-length bargaining . . . ." *Ortiz v.*  
 17 *Fibreboard Corp.*, 527 U.S. 815, 852 (1999).

18 The proposed Settlement here resulted from arm's-length negotiations between  
 19 experienced counsel with the aid of an experienced neutral mediator, all of whom have  
 20 significant class action experience in general, and with the legal and factual issues presented in  
 21 this case in particular. Only after class-wide issues were settled did the parties negotiate  
 22 attorneys' fees and costs.

23 **C. It Is Appropriate for the Court to Enter a Final Order Approving the**  
 24 **Settlement on Behalf of the Class**

25 At the preliminary approval hearing, the Court provisionally certified a Settlement Class  
 26 as follows:

27 All current United States owners and lessees of Model Years  
 2003–2005 General Motors GMT800 Platform automobiles

manufactured on or before December 31, 2004. The makes and models included in the GMT800 Platform, and owned by the Settlement Class are Chevrolet - Avalanche, Silverado, Suburban, and Tahoe; GMC - Sierra, Yukon and Yukon XL; Cadillac - Escalade, Escalade ESV, and Escalade EXT. Excluded is any person, firm, corporation, trust or other entity related to or affiliated with Defendant General Motors and Defendant's legal representatives, assigns and successors. Also excluded is any person who has or had an action for personal injury or death against General Motors as a result of an allegedly defective instrument cluster, speedometer, or stepper motor in any of the subject Vehicles, the judge to whom this case is assigned and any member of the judge's immediate family.

*See* Preliminary Order Approving Settlement, Directing Issuance of Class Notice, and Scheduling Fairness Hearing dated March 4, 2008. All required criteria for Class certification remain satisfied. For the sake of brevity, Class Counsel respectfully refer the Court to the discussion of Class certification at pages 12-18 of Plaintiffs' Memorandum in Support of Preliminary Approval of Settlement Agreement dated February 28, 2008. Plaintiffs respectfully move the Court to approve the Class certification and enter a final order approving the Settlement on behalf of the certified Class.

## V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court to grant final approval to the Class certification and approve the proposed Settlement as fair, reasonable, and adequate pursuant to Fed. R. Civ. P. 23.

DATED this 9th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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